

KENYA / JUDGMENT

Dandora Millers Ltd v Kioni [2026] KEHC 13654 (KLR)

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COURT

High Court

BEFORE

EO Bitta

CASE / FILE NUMBER

Civil Appeal E017 of 2025

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Dandora Millers Ltd v Kioni (Civil Appeal E017 of 2025) [2026] KEHC 13654 (KLR) (17 September 2026) (Judgment)

Neutral citation:

[2026] KEHC 13654 (KLR)

Republic of Kenya

In the High Court at Machakos

Civil Appeal E017 of 2025

EO Bitta, J

September 17, 2026

Between

Dandora Millers Limited

Appellant

and

Stella Kioni

Respondent

Judgment

1.

The Appeal arises from the Judgment in Mavoko CMCC E1014 of 2017 following a road traffic accident involving motor vehicles registration numbers KAZ 512R and KAV 355D.

2.

By a Plaintiff dated 1

st

August 2017, the Respondent sought, inter alia, special damages, costs of the suit and interest at the court's rate.

3.

The Respondent pleaded that on 4

th

December 2014, her motor vehicle registration number KAZ 512R was being lawfully and carefully driven along Mombasa Road near Mlolongo Town when the Appellant's servant, agent and/or authorised driver negligently drove, managed and/or controlled motor vehicle registration number KAV 355D, causing it to violently collide with and damage the Respondent's motor vehicle

4.

The particulars of negligence attributed to the Appellant's driver included driving at an excessive speed in the circumstances; failing to have due regard and attention to other road users; failing to sufficiently apply the brakes, swerve and/or control motor vehicle registration number KAV 355D to avoid the collision; failing to exercise the care and skill reasonably expected of a competent driver; and driving carelessly and recklessly.

5.

The Respondent further pleaded special damages of a total sum of Kshs 360,400/= and stated that, by virtue of an insurance cover, The Kenyan Alliance Company Limited compensated the Respondent for the costs, repairs and all other expenses and is entitled to recover the same from the Appellant through the Respondent under the doctrine of subrogation.

6.

The Respondent further pleaded that the Appellant was liable for the acts and/or omissions of any person using and/or operating motor vehicle registration number KAV 355D with its permission and was, in any event, vicariously liable for the acts and/or omissions of its employees, servants, agents and/or authorised drivers.

7.

The Appellant filed a Statement of Defence and Counterclaim dated 16

th

February 2018, denying the allegations contained in the Complaint and putting the Respondent to strict proof thereof.

8.

The Appellant specifically pleaded that it had never been the registered and/or beneficial owner of motor vehicle registration number KAV 355D and that no motor vehicle belonging to it was involved in the accident of 4

th

December 2014. The Respondent was consequently put to strict proof of ownership and liability.

9.

By way of Counterclaim, the Appellant pleaded that on or about 1

st

November 2017, while its motor vehicle registration number KAR 876B, a Mitsubishi Canter used to transport its merchandise, was in use, Pyramid Auctioneers, allegedly acting as agents and/or servants of the Respondent and/or on her instructions, unlawfully and irregularly attached the vehicle and took it into their custody. The Appellant pleaded that no proclamation had been issued before the attachment.

10.

The Appellant consequently claimed loss of user from 3

rd

November 2017 to 10

th

February 2018 in the sum of Kshs. 856,000/=, together with any further charges accruing until release of the motor vehicle, as well as costs of the suit and Counterclaim.

11.

PW2, Corporal Zephaniah Amdany, attached to Athi River Police Station, Traffic Section, testified that he had a Police Abstract dated 11

th

December 2014 relating to OB No. 2/5/12/2014 concerning a road traffic accident involving the Respondent.

12.

He stated that the accident occurred on 5th December 2014 at approximately 2:30 a.m. along Nairobi-Mombasa Road in the Mlolongo area while the Respondent was driving motor vehicle registration number KAZ 512R.

13.

PW2 testified that motor vehicle registration number KAZ 512R collided with motor vehicle registration number KAV 355D, a Mercedes-Benz. According to the police report, both vehicles were travelling from Nairobi towards Mombasa, with motor vehicle KAV 355D ramming into the rear of the Respondent's motor vehicle, resulting in injuries to the Respondent and her passenger, Aaron Muisano.

14.

PW2 produced the Police Abstract as Exhibit 3 and testified that motor vehicle KAV 355D was blamed for the accident on the basis that its driver had failed to keep a proper distance.

15.

On cross-examination, PW2 stated that he was not the investigating officer and had not visited the accident scene. He identified the investigating officer as PC Ngetich. He further stated that he did not have the scene sketch map, did not know whether the driver of motor vehicle KAV 355D, identified as Samuel David Gatho, had been charged, and was unaware whether witnesses had recorded statements.

16.

PW2 further stated that he did not know whether the motor vehicle had been inspected and was unable to state the extent of damage sustained by either motor vehicle.

17.

PW3, Stella Kioni, testified that she was a driver and had obtained her driving licence in 2010. She adopted her witness statement dated 18th December 2014 as her evidence-in-chief.

18.

PW3 testified that the accident occurred in the early morning of 5th December 2014 at approximately 2:30 a.m. along Nairobi-Mombasa Road. She stated that she was driving motor vehicle KAZ 512R in her lane when motor vehicle KAV 355D suddenly rammed into the rear of her vehicle on the right-hand side.

19.

PW3 testified that she sustained injuries to her forehead and legs and dislocated her hand. She denied having been hit by motor vehicle registration number KBR 004R and maintained that the vehicle involved in the accident was KAV 355D.

20.

On re-examination, PW3 reiterated that motor vehicle KAV 355D had rammed into her vehicle from behind on the right-hand side.

21.

DW1, David Kinyanjui Njenga, an employee of the Appellant, testified on behalf of the Appellant. He produced an authority dated 23rd October 2017 authorising him to testify on behalf of the Appellant. Although the Respondent had not been served with the authority, the trial court allowed the hearing to proceed and noted the issue.

22.

DW1 adopted his witness statement dated 15

th

February 2018 as his evidence-in-chief. He testified that he was not associated with motor vehicle registration number KAV 355D and had no relationship with the said motor vehicle.

23.

DW1 testified that he had conducted a motor vehicle search which established that motor vehicle KAV 355D was registered in the name of Khimjee Zulfikar Zainab. He produced the relevant motor vehicle search documents as Defence Exhibits 1(a) and 1(b).

24.

With respect to the Counterclaim, DW1 testified that the Respondent had instructed auctioneers to attach the Appellant's motor vehicle registration number KAR 876B, a lorry used to transport unga. He stated that the Appellant had not been served with a proclamation prior to the attachment.

25.

DW1 further testified that the attachment occasioned the Appellant loss of use of the vehicle amounting to Kshs. 856,000/=. He produced, among other documents, invoices and petty cash vouchers in support of the amount claimed.

26.

Upon considering the pleadings, evidence and submissions, the trial court found the parties equally liable in the ratio of 50:50. The court awarded the Respondent Kshs. 180,200/=. together with costs and interest, and dismissed the Appellant's Counterclaim.

27.

Aggrieved by the Judgment and Decree, the Appellant lodged the present Appeal. The Appellant challenges the trial court's findings on liability, quantum, the dismissal of its Counterclaim and the award of costs.

28.

In particular, the Appellant contends that the trial court failed to properly evaluate its evidence and submissions; erroneously attributed liability to it in respect of motor vehicle KAV 355D despite its denial of ownership; found the Respondent entitled to damages without sufficient proof that the Appellant owned or was otherwise responsible for the vehicle; and dismissed the Counterclaim despite the evidence relating to the alleged unlawful attachment and loss of user of motor vehicle KAR 876B.

29.

The Appellant further challenges the award of costs to the Respondent, contending that the trial court failed to exercise its discretion on costs judiciously.

30.

The Appellant prays that the Appeal be allowed; the trial court's judgment on liability and quantum be set aside and substituted with an order dismissing the Respondent's suit with costs; the dismissal of the Counterclaim be set aside and substituted with an order allowing the Counterclaim; and that the costs of the Appeal be awarded to the Appellant.

31.

The Appeal was canvassed by way of written submissions.

32.

On liability, the Appellant submitted that liability for damage occasioned by a motor vehicle could only attach upon proof connecting the offending motor vehicle to the Appellant through ownership, possession, control and/or vicarious responsibility. Relying on section 8 of the

Traffic Act

and section 107 of the

Evidence Act

, the Appellant contended that the burden lay upon the Respondent to establish that the Appellant was the registered, beneficial, actual and/or possessory owner of motor vehicle KAV 355D or was otherwise responsible for its operation.

33.

The Appellant maintained that it had expressly denied ownership of motor vehicle KAV 355D in its Defence and Counterclaim. It submitted that DW1 had conducted a motor vehicle search which established that the vehicle was registered in the name of Khimjee Zulfikar Zainab. It further contended that the Respondent had not produced a motor vehicle search or other documentary evidence establishing the Appellant's ownership.

34.

The Appellant further challenged the Respondent's reliance on a letter dated 25

th

February 2015 allegedly confirming insurance of motor vehicle KAV 355D by Fidelity Shield Insurance Company Limited, contending that the maker of the letter was not called to testify and that the document had not been properly proved.

35.

The Appellant submitted that it had sought to enjoin Fidelity Shield Insurance Company Limited and Khimjee Zulfikar Zainab as third parties and that a death certificate relating to the latter had been produced. It maintained that there was no evidence establishing any relationship between the Appellant and motor vehicle KAV 355D.

36.

The Appellant contended that the trial court improperly shifted the burden of proof to it and erroneously apportioned liability at 50:50. It challenged, in particular, the trial court's reliance on *Belinda Cash v Coast Bus Company* (2008) eKLR in reaching that conclusion.

37.

On the Counterclaim, the Appellant submitted that its motor vehicle registration number KAR 876B, Mitsubishi Canter, had been unlawfully attached by Pyramid Auctioneers without prior service of the requisite notices. Relying on *Syrilla A. Barasa & 2 Others v Margaret Aseka Barasa* (2022) eKLR, it contended that it had not been served with a notice of entry of judgment, notice of attachment or proclamation notice.

38.

The Appellant maintained that the alleged unlawful attachment occasioned loss of user from 3rd

November 2017 to 10

th

February 2018 amounting to Kshs. 856,000/=. It relied on the invoices and petty cash vouchers produced by DW1 in support of the claim.

39.

On costs, the Appellant submitted that it had incurred expenses in defending the suit since 2018 and argued that the Respondent's failure to conduct a proper motor vehicle search resulted in the Appellant being erroneously sued and its motor vehicle subsequently being attached.

40.

The Appellant urged the Court to allow the Appeal, set aside the trial court's judgment on liability and quantum, dismiss the Respondent's suit with costs, allow the Counterclaim and award the Appellant the costs of the Appeal.

41.

The Respondent submitted that, being a first appeal, the Court is required to reconsider and re-evaluate the evidence on record and draw its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify. The Respondent relied on *Selle & Another v Associated Motor Boat Company Limited* [1968] EA 123.

42.

On liability, the Respondent submitted that the Respondent had discharged the burden of proving negligence against the Appellant on a balance of probabilities. It relied on section 107(1) of the

Evidence Act

and *Kiema Mutuku v Kenya Cargo Handling Services Ltd* [1991] KLR 464, arguing that the Respondent was required to establish negligence and a causal connection between the Appellant's negligence and the damage suffered.

43.

The Respondent submitted that PW2, the police officer, confirmed that motor vehicle registration number KAV 355D was blamed for the accident, having allegedly rammed into the rear of motor vehicle registration number KAZ 512R. The Respondent further relied on the Police Abstract and a letter dated 25

th

February 2015 from Fidelity Shield Insurance Company Limited, which it contended constituted evidence connecting motor vehicle registration number KAV 355D to the Appellant.

44.

The Respondent contended that the Appellant could not rely on the absence of registration in its name to escape liability. Relying on section 8 of the

Traffic Act

and authorities including *Kenya Bus Services Ltd v Dina Kawira Humphrey* [2003] eKLR, *Samuel Mukunya Kamunge v John Mwnagi Kamuru*, Nyeri HCCA No. 34 of 2002 and *Nancy Ayemba Ngaira v Abdi Ali*, Msa HCCA No. 107 of 2008 (2010) eKLR, it submitted that ownership of a motor vehicle may be established through evidence of actual, beneficial or possessory ownership and is not necessarily confined to the name appearing in the registration records.

45.

The Respondent further submitted that the evidence established that the driver of motor vehicle KAV 355D was negligent, particularly having regard to the fact that the vehicle was travelling behind the Respondent's motor vehicle and therefore ought to have maintained a safe distance and exercised reasonable care to avoid the collision. It relied on *Lilian Gakathi Mworira v Stanley Mwithumbi* on the duty of a driver to maintain a proper lookout and drive at a speed that permits him to stop or take evasive action when necessary.

46.

On quantum, the Respondent submitted that the special damages pleaded in the Complaint were specifically proved through the documentary evidence produced at trial. It submitted that the Respondent had established the sum of Kshs. 355,000/= in respect of the repairs to motor vehicle KAZ 512R after taking into account the salvage value, together with Kshs. 5,400/= in towing charges.

47.

The Respondent relied on the assessment report, policy schedule, claim payment summary, discharge voucher and salvage sale receipt produced before the trial court in support of the claim. It further relied on *Nkuene Dairy Farmers Co-operative Society Limited & James Kimathi v Ngacha Ndeiya* (2010) eKLR and *Abdi Ali Dere v Firoz Hussein Tundal & 2 Others* [2013] eKLR on the assessment of damages for property damage.

48.

On the Counterclaim, the Respondent submitted that the Appellant had failed to establish that the alleged attachment of motor vehicle KAR 876B had occurred or that it was carried out by agents acting on the Respondent's instructions.

49.

The Respondent further challenged the validity of the verifying affidavit accompanying the Counterclaim. It was submitted that DW1 had not demonstrated that he was duly authorised by the Appellant company to swear the verifying affidavit and that no board resolution or other written authority was produced. Reliance was placed on Order 4 Rule 1 of the Civil Procedure Rules and *East African Portland Cement Ltd v Capital Markets Authority & 4 Others* [2014] eKLR.

50.

The Respondent further contended that the authority to act produced by DW1 was questionable. It submitted that DW1 had testified that three of the Appellant company's four directors, including Monica Wangui, had died, yet the authority was allegedly signed and sealed in the presence of Monica Wangui.

51.

The Respondent consequently challenged the authenticity and regularity of the document and alleged that it had been fraudulently or irregularly executed.

52.

In the alternative, the Respondent submitted that, even if the Counterclaim was properly before the Court, the Appellant had failed to prove the alleged attachment. It pointed out that DW1 admitted during cross-examination that he did not file or produce the warrants of attachment which he claimed had been left with him by the auctioneers.

53.

The Respondent submitted that the Appellant bore the evidentiary burden of proving the facts pleaded in its Counterclaim pursuant to section 107 of the

Evidence Act

. It urged the Court to draw an adverse inference under section 112 of the

Evidence Act

from the Appellant's failure to produce the warrants of attachment, proclamation or other documentary evidence demonstrating that the vehicle had been seized by Pyramid Auctioneers on the Respondent's instructions.

54.

On the claim for loss of user, the Respondent submitted that the Appellant had failed to strictly prove the alleged loss of Kshs. 856,000/=. It contended that the invoices and petty cash vouchers produced by DW1 were insufficient to establish the alleged loss, particularly in view of DW1's admission that no receipts had been produced to demonstrate that the alleged expenditure had actually been incurred

55.

The Respondent relied on *Zacharia Waweru Thumbi v Samuel Njoroge Thuku* [2006] eKLR and *Abdi Werdi Abdulahi v James Royo Mungatia & Another* [2019] eKLR, submitting that special damages must not only be specifically pleaded but must also be strictly proved, ordinarily through documentary evidence demonstrating actual expenditure.

56.

The Respondent therefore urged the Court to uphold the dismissal of the Counterclaim, contending that the alleged attachment and consequential loss of user had not been established on a balance of probabilities and that the amount claimed was speculative and unsupported by sufficient documentary evidence.

57.

On costs, the Respondent submitted that costs follow the event and urged the Court to award it the costs of the Appeal pursuant to section 27 of the

Civil Procedure Act

and section 12 of the

Appellate Jurisdiction Act

. It contended that the Appeal had been occasioned by the Appellant's failure to prove its case and that the Respondent had been put to unnecessary expense in defending the Appeal and the Counterclaim.

58.

The Respondent urged the Court to dismiss the Appeal with costs and uphold the decision of the trial court. I have gone through the record of appeal, the memorandum of appeal, and the rival submissions by the parties from which I distilled the following issues as arising for determination:

59.

Whether the trial court properly evaluated the evidence relating to ownership, possession, control and/or responsibility for motor vehicle registration number KAV 355D, and whether the Appellant was properly held liable for the accident; Whether the Respondent proved, on a balance of probabilities, that the driver of motor vehicle registration number KAV 355D was negligent and that such negligence caused the collision and the damage to motor vehicle registration number KAZ 512R; Whether the Appellant proved its Counterclaim for unlawful attachment and loss of user of motor vehicle registration number KAR 876B, and whether the trial court erred in dismissing the counterclaim and finally who should bear the costs of the suit, Counterclaim and the Appeal.

60.

This being a first appeal, the Court is required to reconsider and re-evaluate the evidence on record and draw its own conclusions, while bearing in mind that it did not have the benefit of seeing and hearing the witnesses testify as was set out in the case celebre of *Selle & Another v Associated Motor Boat Company Limited* [1968] EA 123.

61.

The Court is enjoined to exercise caution before interfering with findings based on the trial court's assessment of the credibility and demeanour of witnesses, but, where the trial court failed to consider material evidence, misapprehended the evidence, or concluded unsupported by the evidence, the appellate court is entitled to interfere.

62.

It appears that the trial court's finding on liability against the Appellant was premised on the view that motor vehicle KAV 355D was being driven by the Appellant's servant, agent and/or authorised driver, a fact that was specifically traversed by the Appellant.

63.

The Appellant pleaded expressly that it had never been the registered or beneficial owner of KAV 355D and that no motor vehicle belonging to it was involved in the accident. Once that allegation was specifically traversed, the burden remained upon the Respondent to establish, on a balance of probabilities, the nexus between motor vehicle registration No. KAV 355D and the Appellant.

64.

Section 8 of the

Traffic Act

creates a rebuttable evidentiary position concerning the person in whose name a motor vehicle is registered. It provides that a person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.

65.

That section does not dispense with the need to establish the relevant connection between the defendant and the offending vehicle where ownership and responsibility have been expressly denied.

66.

In the present case, the evidence of DW1 was that a search had been conducted and that KAV 355D was registered in the name of Khimjee Zulfikar Zainab. The Appellant produced in evidence a copy of a motor vehicle search, Defence Exhibit 1 (a) and 1 (b), which documentary evidence was not displaced by any motor vehicle search produced by the Respondent.

67.

The trial court found the Appellant's evidence inconclusive on the point but instead relied on the Police Abstract and a letter dated 25th February 2015 from Fidelity Shield Insurance Company Limited. The Police Abstract establishes, at most, that KAV 355D was recorded as one of the vehicles involved in the accident and that it was blamed by the police. It does not, without more, establish that the vehicle belonged to the Appellant or that its driver was the Appellant's servant, agent or authorised driver.

68.

Similarly, the letter from an insurer would have to be considered in light of the evidentiary foundation upon which it was produced. The maker was not called to testify, and the court, in an interlocutory application in the very same matter, held the letter inadmissible as it was written on a without prejudice basis; how the trial court would make an about-turn in respect to the admissibility of the same document is unjustifiable.

69.

In addressing the document's inadmissibility at the interlocutory application, the trial court cited with approval the decisions of the Court in *Lochab Transport Limited, Mumias Sugar Co. Limited and another -vs- Beatrice Akinyi Omondi* (2016) eKLR on inadmissibility of contents of communications made on a “without prejudice basis”.

70.

In any event, it is my view that the fact that KAV 355D was insured by a particular insurer is not, without more, proof that the Appellant owned, possessed, controlled or was vicariously responsible for the vehicle.

71.

I hold the view that the Respondent had to go further and demonstrate the relationship between the Appellant and KAV 355D. There is no evidence on the entire record showing that the Appellant either purchased the vehicle, possessed it, controlled it, employed its driver, authorised its use, or otherwise had such a relationship with the vehicle as would attract liability.

72.

The trial court appears to have placed considerable reliance on the fact that KAV 355D was identified as the vehicle that collided with KAZ 512R. That finding establishes the vehicle involved in the accident, but does not establish the identity of the person legally responsible for that vehicle.

73.

In my view, the trial court erred in treating the evidence concerning the accident as sufficient to establish the Appellant's responsibility for motor vehicle registration No. KAV 355D.

74.

PW2 testified from the police records that KAV 355D had rammed into the rear of KAZ 512R and that the driver of KAV 355D was blamed for failing to keep a proper distance. PW3, who was herself driving KAZ 512R, gave direct evidence that KAV 355D suddenly collided with the rear right-hand side of her vehicle.

75.

A driver travelling behind another vehicle owes a duty to maintain a sufficient distance and to keep a proper lookout to enable him or her to stop or take evasive action when circumstances require. The Court of Appeal in *Orioki v Kevian Kenya Limited* [2025] KECA 780 (KLR) held as follows;

43.

The trial court found that the appellant was liable for the rear- end collision, as the appellant admitted to hitting the respondent's vehicle. Under common law, a driver who hits another vehicle from behind is generally presumed to be at fault, unless there is sufficient evidence to rebut this presumption. (See: *Njuguna v Chogo* [1985] KLR 452). In this case, the appellant admitted that he collided with the respondent's vehicle from behind. This fact alone placed the burden on the appellant to prove that the collision was not due to his negligence.

.....In road traffic cases, the duty of care requires that drivers maintain a safe distance, and the failure to do so can lead to a finding of negligence if it results in a collision.

51.

The appellant, as a driver, owed a duty of care to the respondent and all other road users. His failure to maintain a safe distance from the respondent's vehicle was a breach of this duty. The case of *Stapley v Gypsum Mines Limited* (supra), as cited by the respondent, emphasized that legal causation must be determined by common sense and an analysis of the facts at hand. In the circumstances, we find that the breach of duty by the appellant directly resulted in the accident.

76.

In this case, where there was a collision in which a vehicle rams into the rear of the vehicle ahead, there was a strong evidential basis for an inference of negligence on the vehicle that collided with the other from behind.

77.

However, that finding must be distinguished from the question of whether the Appellant is liable for that negligence.

78.

PW3's evidence was direct evidence of how the collision occurred, but she did not establish the ownership or agency relationship between the driver of KAV 355D and the Appellant.

79.

Apportionment of liability presupposes that there is evidence establishing negligence or other actionable conduct attributable to each party. There was no evidence, on the material placed before the Court, demonstrating that the Respondent contributed to the accident to the extent of 50%. The Appellant was not shown to own or control KAV 355D; there was therefore no evidential foundation upon which to impose liability upon it. The Respondent failed to establish the Appellant's connection with the offending vehicle.

80.

I find that the Respondent proved, on a balance of probabilities, that motor vehicle No. KAV 355D was involved in the accident and that there was evidence of negligence on the part of its driver, but failed to prove that the Appellant was the owner, beneficial owner, possessor, controller, employer or otherwise legally responsible for that vehicle or its driver.

81.

I therefore do not agree with the trial court's finding of 50:50 liability against the Appellant as the same was not based on evidence adduced on a balance of probabilities.

82.

The Appellant's Counterclaim raises a separate cause of action to be determined independently of the Respondent's claim.

83.

The Appellant alleged that Pyramid Auctioneers, acting on the Respondent's instructions, unlawfully attached motor vehicle KAR 876B and thereby deprived it of its use between 3rd November 2017 and 10th February 2018.

84.

DW1 gave evidence that the vehicle was attached and that the Appellant had not been served with a proclamation. DW1 admitted that he did not produce the warrants of attachment or other primary documentation relating to the alleged seizure, notwithstanding his evidence that such documents had been left with him.

85.

The learned trial magistrate, in addressing this issue, found and held that the Appellant's motor vehicle had been attached pursuant to warrants of attachment issued by the Court in the very suit that was before it.

86.

The warrants followed an interlocutory judgment entered in default of appearance and defence on 12th September 2017. The record further shows that, upon the Appellant's successful application to set aside the execution proceedings, the Court, in its ruling delivered on 7th February 2018, granted the Appellant leave to enter appearance and defend the suit.

87.

The learned trial magistrate further held that execution pursuant to a valid court order constitutes a lawful process and that the execution complained of had been undertaken by a duly licensed auctioneer acting in the capacity of an officer of the Court.

88.

In the circumstances, the court found that the auctioneer could not be held liable for executing a lawful court process. The learned trial magistrate also held that the detention of the Appellant's motor vehicle was founded upon a lawful process of the Court and, consequently, that no liability in damages could arise from the attachment complained of. On that basis, the learned trial magistrate dismissed the Appellant's claim in its entirety.

89.

This view by the trial court has considerable merit in my view; the Court of Appeal in *Aroni Sure & 9 others v Gesare Nyamaiko* [1988] eKLR held as follows on the point:

29.

In the case of *Blassio Simiyu v Vincent Wanjala Sinino*, Civil Appeal 108 of 1984, Vol 3 KCA 211, this court, basing itself on several authorities, held that a Court Broker is completely protected in respect of his acts in executing a warrant of attachment, under section 6 of the

Judicature Act

cap 8, provided they were in respect of the property of the person against whom, according to the warrant, it was directed to be executed.

Section 6 of the

Judicature Act

provides that:

“

No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would

have been bound to execute if within the jurisdiction of the person issuing it.”

90.

I ask myself, was the warrant valid and subsisting when the auctioneer executed it? The answer is yes, and was the Appellant's vehicle property properly liable to execution under that warrant? The answer is, at the material time, yes. I can hardly fault the trial court for its decision in that regard.

91.

If I am wrong, let me consider the quantum claimed for loss of user. Loss of user, where specifically claimed as special damages, must be proved by credible evidence showing both the fact of loss and its amount. The invoices and petty cash vouchers produced by DW1 were not, without more, sufficient to demonstrate in my view that the Appellant actually incurred the particular expenditure claimed or that the amount represented the loss occasioned by the detention of KAR 876B.

92.

The evidence, as summarised, did not satisfactorily demonstrate the basis upon which Kshs. 856,000 was calculated, the daily rate adopted, the actual income generated by the vehicle before its attachment, or the net loss attributable to its detention.

93.

I would uphold the dismissal of the Counterclaim on the basis that the Appellant failed to prove the unlawful attachment and the consequential loss of user to the required standard. I find that the Counterclaim fails on the merits

94.

Section 27 of the

Civil Procedure Act

gives the Court discretion regarding costs, although the general rule is that costs follow the event. The trial court's award of costs to the Respondent was consequential upon its finding in favour of the Respondent. Since that finding cannot stand, the order on costs must likewise be reconsidered.

95.

The Appellant has succeeded in demonstrating that the trial court erred in imposing liability upon it. However, the Appellant has not succeeded on its Counterclaim. The Respondent, on the other hand, has failed in the principal claim but successfully resisted the Counterclaim.

96.

In those circumstances, it would be appropriate for each party to bear its own costs of the proceedings before the trial court, and before the Appeal.

The upshot is that I make the following orders:

a.

The judgment and decree of the trial court finding the Appellant 50% liable for the accident is hereby set aside; the award of Kshs. 180,200 to the Respondent, together with the consequential orders on interest and costs, is also set aside and is substituted with an order dismissing the suit against the Appellant.

b.

The dismissal of the Appellant's Counterclaim is upheld.

c.

Each party shall bear its own costs of the suit and Counterclaim before the trial court and the Appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MOMBASA THIS 17

TH

DAY OF SEPTEMBER 2026

EMMANUEL BITTA

JUDGE OF THE HIGH COURT

In the presence of;

Hamisi C/A

Were for the Appellant

Wekesa for the Respondent

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